No. 20,760

IN THE

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WAYNE JOHNSON, An Individual, d/b/a
CARMICHAEL FLOOR COVERING CO.

and

JOHN DUNCAN, An Individual, d/b/a
DUNCAN FLOOR CO., RESPONDENTS

BRIEF OF RESPONDENTS

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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I.

STATEMENT OF THE CASE

At the hearing of this matter before the Trial Examiner and in this proceeding, it has been, and is, the contention of Respondents that at the time the present dispute arose Respondents ceased to be employers as defined in the collective bargaining agreement and, therefore, were no longer subject to the provisions of that agreement. It is, therefore, the contention of Respondents that the findings of the Board are based upon a misinterpretation of the facts of the case. In that regard Respondents concede that had they remained "employers" as defined in the

collective bargaining agreement they would have been in violation of the agreement.

The collective bargaining agreement recognizes two classifications of employers. In the collective bargaining agreement (G.C. Exh. 17) two classifications of employers are defined. In paragraph 11 a Fair Employer is defined as one who, among other things, has "$1,000.00 in stock", and, in addition, employs members of the Union for installation of this stock. The second classification is Labor Contractor, defined as one who fabricates and installs floor coverings.

From the testimony adduced at the hearing before the Trial Examiner, it is recognized that there are at least three classifications of businesses directly involved in the field, with which we are concerned. The first classification would be retail sales operations which sell various types of floor coverings but which do not hire installation employees but, instead, employ labor contractors for installation. The second classification would be retailers who hire their own employees for installation. The third classification are the labor contractors who install for the retailers mentioned as the first classification. (Tr. 88-89.)

II

ARGUMENT

A.

THE PROHIBITION AGAINST SUBCONTRACTING APPLIES ONLY TO LABOR CONTRACTORS.

It has been the contention of the Board throughout the proceedings in this case that the words mentioned

in paragraph 12 of the agreement are binding upon Respondents. The pertinent provisions of paragraph 12 are as follows: "Employer agrees to refrain from contracting out unit work now being performed by his employees covered by this contract."

This clause is contained in paragraph 12 which, by its heading, is entitled "Labor Contractors". The evidence is replete with testimony that both of the Respondents were engaged in business as retailers and installers of floor coverings prior to the dispute here in question.

While negotiations for a new working agreement were in progress, the Union brought about a dispute over the right of an employer of the classification of Respondents to subcontract installation work, apparently on the contention that the cited provision of section 12 hereinabove was a prohibition which applied to Respondents. This dispute was never completely resolved but the Union persisted in its contention that an employer of the classification of Respondents would not be permitted to subcontract installation work.

B.

RESPONDENTS HAD A RIGHT TO CEASE BEING EMPLOYERS.

Because of the contention of the Union that they could not subcontract work otherwise done by their employees, both Respondents decided to cease being employers. The decision of Duncan was due, in part, to ill health. (Tr. 137.) Respondent Carmichael Floor Covering Co. decided to cease being an employer be-

cause of a decrease in work and an inability to maintain a regular full time working staff of employees. (Tr. 157-158.)

At the time of the signing of the 1963 agreement by other members of the employer association, both Respondents notified the Union that they were discontinuing "their operations as employing contractors" and would not be parties to the new agreement. Thereupon, both Respondents ceased to employ any members of the Union in their business activities, completely terminated installation of floor coverings and Respondent Carmichael disposed of all its installation equipment. Immediately after termination of their installation businesses both Respondents employed labor contractors who were parties to collective bargaining agreements with the Union.

C.

THE CONDUCT OF RESPONDENTS WAS NOT AN UNFAIR LABOR PRACTICE.

The determination of the Trial Examiner that the refusal of Respondents to sign the collective bargaining agreement constituted an unfair labor practice is not supported by the evidence. It is only reasonable that an employer must have the right to discontinue a particular business enterprise at his own discretion. Regardless of the nature of his difficulties in the particular enterprise, he cannot be compelled by anyone to remain in business against his wishes.

In the particular case at hand, each of the employers had come to the determination that he would

not remain in the installation business. Both employers felt constrained to remain in the retail sales end of the floor covering business and have done so. Both employers have done this with the intention of employing subcontractors for installation without any intention of damaging the Union or its membership.

The decision of the Trial Examiner in the present matter would seem to hold that it is an essential requirement that an employer bargain collectively with a Union concerning the decision of the employer to discontinue being an employer. We can comprehend no justification for such a requirement.

Additionally, there is no evidence in the present case of any refusal to bargain on the issue of cessation of employment, if this be construed to be an issue. Respondent Duncan discontinued his installation operation because his workers quit. (Tr. 109.) Respondent Carmichael sold his installation equipment to a new Union labor contractor. (Tr. 159-160.) Having discontinued operations in the installation field neither Respondent remained an employer and, therefore, neither was any longer a member of an association of employers and neither was any longer affected by a collective bargaining contract.

It is the contention of both Respondents that the holding in *Textile Workers Union v. Darlington,* 58 LRRM 2657 is complete authority for their position. Respondents contend that they have an absolute right to bring about a partial termination of business in any field in which they had previously been occupied so long as the termination is not motivated by an

intent to harm unionism. The Trial Examiner dismisses this contention with the statement that "The charge in the instant case, however, relates solely to Respondents' statutory duty to bargain." If the ruling of *Textile Workers Union v. Darlington* is correct and if, in fact, Respondents are no longer employers, there is no issue concerning refusal to bargain or statutory duty to bargain. Nowhere is there a statutory duty for an employer to bargain concerning terminating his own business.

Dated, Sacramento, California,
July 21, 1966.

Respectfully submitted,
CLIFFORD R. LEWIS,
Attorney for Respondents.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CLIFFORD R. LEWIS,
Attorney for Respondents.